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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 1027 90

CARLOTA BENITEZ SAMPAYO,
Petitioner,

vs.

THE BANK OF NOVA SCOTIA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION TO PETITION

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WALTER L. NEWSOM, JR.,
Of Counsel.

June 17, 1940.

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BRIEF IN OPPOSITION TO PETITION.

Statement.

The Equity Proceedings:

Respondent, on October 20, 1936, filed in the District Court of the United States for Puerto Rico a bill in equity against Benitez Sugar Company, a corporation, and against various natural persons, including petitioner, individually and as members of José J. Benitez e Hijos, a civil law contractual "Communidad",[1] whereby foreclosure was sought of certain securities in satisfaction of various joint and several obligations of the corporation and the "Communidad".

[1] The "Communidad" was a partnership within the meaning of the Bankruptcy Act. See *Benitez v. Bank of Nova Scotia*, 110 F. (2d) 169, 172.

A receiver was appointed, who took possession of the properties and operated the enterprise of the "Comunidad" and the corporation under orders of the Court, and a final decree was entered in favor of respondent on August 22, 1938, which adjudged that the corporation and the "Comunidad" were jointly and severally indebted to respondent in the principal amount of $673,569.82 with interest; that the members thereof were secondarily liable in proportion to their respective shares in the "Comunidad", that of petitioner being a one-twelfth share; that this "Comunidad" and the corporation must on or before September 1, 1938, pay said sum with interest to respondent, in default of which a special master was directed to sell at public auction the various securities consisting of mortgage bonds or notes, shares of stock, chattel mortgages and various crop loan (colono) contracts (R. 373-379).

The debt not having been paid as ordered, the securities were advertised for sale at public auction by the special master to be held on October 13, 1938, at 10:00 o'clock A. M., at which time they were duly sold.

The Proceedings in Bankruptcy:

Approximately one hour before the time fixed for the master's sale, petitioner filed in the District Court her individual petition as an alleged farmer-debtor for composition or extension under Section 75 of the Bankruptcy Act. She claimed to be a "farmer" not only by virtue of an alleged poultry business carried on at her home,[1]

[1] Petitioner's alleged poultry business was not a primary occupation but rather a hobby. Her schedules showed 53 chickens and 176 pigeons at her home in the city of Ponce, P. R. The sale of eggs, chickens and squabs produced $50 or $60 per month, but her husband, President of Pan-American Trading Company, gave her in excess of $200 per month and when she needed money she got it from

but also by virtue of her ownership of a one-twelfth interest in the "Comunidad".[2] (R. 1-4).

Petitioner's schedule of debts set forth her proportionate one-twelfth liability of the debts of the "Comunidad" and the corporation; a debt of $500 due her personal attorney in this litigation and a debt of $16.07 due in connection with her alleged poultry business (R. 5-34). Her schedule of assets listed all the properties and assets of the "Comunidad" and the corporation, certain personal property wholly owned by her consisting of household effects valued at $1,850, and chickens, pigeons, lofts, poultry houses, supplies, etc., valued at $1,199. She also listed a claim, not specified in amount, against the corporation and "Comunidad". (R. 36-51).

The petition under Section 75 was filed *ex parte*, and the Court entered a *pro forma* order of approval and referred it forthwith to the Conciliation Commissioner (R. 66). Her inventory and proposal were thereafter filed (R. 67-83; 96-120). Having failed to obtain from creditors the

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him. She kept no books, owed no debts except one for $16.07 growing out of her poultry operations, and had no personal debts except amounts due her attorneys. She enjoyed the work and had had the poultry about a year and a half. Her education was in a finishing school and she learned the poultry business from her reading (R. 309-318). The alleged poultry business and assets thereof were not included in the equity receivership.

[2] The properties and business of the "Comunidad" are located in the island of Vieques where all the operations thereof are carried out. They are entirely distinct from and have no relation to the alleged poultry business (R. 310). From July 1, 1933, to the time the receiver took over, respondent was in possession of and had operated the properties and business in Vieques, pursuant to the provisions of a crop loan contract, receiving and applying the income therefrom on account of the crop loan debts due it by the "Comunidad" and the corporation (R. 361-363).

requisite assents, on November 30, 1938, petitioner amended her petition and asked to be adjudged a bankrupt under subsection (s) of said section, that her property be appraised, exemptions be set aside, and that "she be allowed to retain possession or be placed in possession of all the remainder of her property" upon the conditions provided in subsection (s) (R. 121-124).

On December 1, 1938, respondent filed a motion to dismiss the farm-debtor petition on the grounds, among others, that petitioner was not a farmer and that the Court was without jurisdiction to entertain the petition (R. 174-176). Petitioner filed written objections to the motion, a hearing was had and evidence presented, and the Court on January 3, 1939, entered findings of fact and conclusions of law, an opinion, and an order of dismissal with costs (R. 225-239).

Petitioner's Relation to the Business of the "Comunidad":

Petitioner had never participated in the business and operations of the "Comunidad" and corporation, nor in the management thereof, nor had she ever given any directions or instructions with respect thereto. Her intervention had been limited to the receipt of advances and any profits which pertained to her share. She knew nothing of the business and operations, nor what amounts had been spent therein. She had never paid anything personally to cover expenses of operation, but supposed that the manager had paid them (R. 310-316).

The "Comunidad" was domiciled in Vieques where it maintained its offices and Mr. José Benitez Díaz had been its general manager from the date of its establishment in 1917 (R. 345-346).

There had been no net income of the "Comunidad" or corporation, and the amounts claimed to have been re-

ceived by petitioner as income from the business in Vieques were not profits nor advances which pertained to her by virtue of her ownership of a one-twelfth share.[4]

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[4] There were two items claimed to have been received by petitioner as income from the "Comunidad". The first was $3,000 received in 1933 for and upon signing a deed extending the term of the communal contract (R. 318-319). There is nothing in the record to show who made this payment. The second item was for $20,000 in 1937. Of this amount, the sum of $17,500 was paid to petitioner pursuant to an agreement entered into between the respondent and the members of the "Comunidad" and the corporation, including petitioner, with reference to the distribution of $101,443.20 paid by the Secretary of Agriculture as benefit payments corresponding to the sugar crop of 1935 of the "Comunidad" and the corporation under the Agricaltural Adjustment Act as follows: (1) a check for $91,201.80 in favor of respondent, the corporation and all the members of the "Comunidad"; (2) a check for $10,151.40 in favor of the same payees except respondent (R. 318-319; 337-340). The agreement (R. 337-340) shows that of the total amount of $101,443.20, the members of the "Comunidad" received an aggregate of $45,000, yet respondent credited the crop loan account of the "Comunidad" and the corporation for advances made by respondent under the crop loan agreement to finance the making of the said 1935 sugar crop with the total amount of $101,443.20 less an expense item of $600. (R. 365).

After making this credit, the said loan account for 1935 crop advances still showed a debtor balance due respondent. (R. 319).

The remaining $2,500 of the $20,000 said to have been received by petitioner is not explained in the record.

Other than the said amounts, petitioner received nothing from the "Comunidad" or corporation during the years 1933 to 1938 (R. 312-313). Nor does the record show what if anything was received by petitioner from the "Comunidad" or from the corporation prior to the year 1933.

The Decision of the Circuit Court of Appeals.

On appeal from the order dismissing the petition, the Circuit Court of Appeals for the 1st Circuit confirmed the decision of the District Court. Although the question was not raised by the parties, the Circuit Court, as a preliminary matter, held that the Chandler Act had amended Section 75(r) of the Bankruptcy Act and that consequently the applicable definition of "farmer" was that one given in Section 1(17) of the Bankruptcy Act as revised by the Chandler Act. It then held that petitioner was not a "farmer" by virtue of the enterprise of the "Comunidad" and the corporation because not personally engaged in the operations thereof; and that, assuming her alleged poultry business amounted to the production of poultry or poultry products, as defined in Section 75 of the Act, she was not a farmer by virtue thereof because the principal part of her income was not derived therefrom.

The opinion is reported and published in Vol. 109, Fed. (2d), pp. 743, 747 *et seq.*

Petitioner filed a motion for rehearing on the ground that the Court below had erred in holding that the applicable definition of the term "farmer" was that given in Section 1(17) of the Act as revised by the Chandler amendments and urged that under the definition contained in Section 75(r), she qualified as a "farmer" both by virtue of her alleged poultry business and her share in the "Comunidad". The motion for rehearing was denied on February 21, 1940, and the opinion is printed in the Appendix hereto.

Argument.

1

Petitioner urges as the principal reason for granting certiorari that the decision of the Circuit Court below is

in conflict with the decision on the same matter of the Circuit Court of Appeals for the Seventh Circuit in the case of *In re Horner*, 104 F. (2d) 600, decided May 29, 1939. The question of the applicability of the new definition of "farmer" as employed in Section 1(17) of the Bankruptcy Act as revised by the Chandler Act rather than the old definition employed in Section 75(r) of the Act was not raised, considered nor decided by the case of *In re Horner, supra*. Furthermore, in that case the petitioning debtor clearly qualified as a "farmer" under either the old or new definition. We find no real conflict between the two decisions.

If, however, it be assumed that the two decisions are in conflict, that the decision of the Circuit Court below introduced conflict in the decisions of the Federal Courts and caused doubt and confusion as to the applicable definition of "farmer" in proceedings under Section 75 of the Act, such conflict, doubt and confusion have now been entirely eliminated by the passage of Section 2 of the Act of Congress of March 4, 1940. (Chapter 39, Sess. Public—No. 423, 76th Congress (S. 1935); U. S. Code Congressional Services, 1940, p. 41.)

If the Chandler Act did amend Section 75(r) in so far as inconsistent with Section 1(17) of the Revised Act, as held by the Circuit Court below, then the reenactment of the old Section 75(r) by Section 2 of the amendatory Act of March 4, 1940, clearly had the effect of abrogating the such amendment resulting from the Chandler Act, of reinstating the old definition of the term "farmer" and of making it applicable to Section 4(b) and 75 alike. And that was undoubtedly the intention of Congress upon passing the Act of March 4, 1940. There could have been no other substantial reason or necessity for amending Section 75(r). Such an amendment was not necessary "*to ex-*

tend until March 14, 1944, the time during which petitions may be filed by farmers under Section 75 of the Bankruptcy Act, the avowed purpose of the Act of March 4, 1940, nor was the exclusion from Section 75(r) of reference to "Section 74" of importance since Section 74 had already been entirely eliminated by the Chandler Act.

While we think the decision of the Circuit Court below is entirely correct, even if we assume that it was erroneous, there is certainly no necessity now for a review by this Court in order to bring about uniformity of decision among the Federal Courts, nor to settle a doubtful question of Federal law of public importance, for that has been done by the Act of Congress of March 4, 1940.

2

If we assume that the Court below did commit error in applying the new definition of "farmer" contained in Section 1(17) of the Act, petitioner was in no way prejudiced since she would neither qualify as a "farmer" under Section 75(r) of the Act, and the Court below seemed of that opinion.[5] See *Shyvers* v. *Security First National Bank*, 108 F (2d) 611 (cert. den. March 4, 1940, 60 S. Ct. 608).

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[5] In the opinion of the Circuit Court below denying petitioner's motion for rehearing, it was said:

> "We are far from implying that appellant would qualify as a 'farmer' even if the old definition in Section 75(r) is still in effect. If *Shyvers* v. *The Security-First National Bank*, decided by the Circuit Court of Appeals for the Ninth Circuit on December 21, 1939, is correct, appellant would seem not to be a 'farmer' even under the definition of Section 75(r). We have not gone into this, because we believe that the applicable definition is the new one found in the Chandler Act." (Appendix, p. 13.)

Appendix p. 13 and the *Shyvers* case is correct, certiorari having since been denied.

The reasoning of the *Shyvers* case is *a fortiori* applicable to the present case. In the former, Mrs. Shyvers was sole owner of the properties, while in the latter, petitioner is merely the owner of a one-twelfth share in the "Comunidad" which owns the properties.

Furthermore, the amounts received by petitioner from the "Comunidad" were not received by her as income or profits. In fact the "Comunidad" earned no income or profits.[6] The term "income" as used in Section 75 of the Act means "net income". (See *Sherwood* v. *Kitcher*, 86 F. (2d) 750, 751.) The item of $3,000 was received for signing a deed of extension, not because of any agricultural operations. And of the $20,000, the amount of $17,500 was received pursuant to a contract with respondent, the corporation and members of the "Comunidad". If the $45,000 received by the members of the "Comunidad" be considered as net income or profits of the "Comunidad", petitioner's one-twelfth distributable share would not have exceeded $3,750 and against this amount would have to be deducted petitioner's *pro tanto* liability for the funds advanced to the "Comunidad" by respondent to finance the 1935 sugar crop, which deduction would exceed $3,750.

> "Section 327.—The share of the participants in the benefits as well as in the charges, shall be proportioned to their respective shares." (Civil Code of Puerto Rico (1930 Ed.) Sec. 327, par. 1.)

Nor was petitioner a farmer as defined in Section 75(r) of the Act by virtue of her alleged poultry business. Her activities in this respect, though personal, seem to be more nearly a hobby than a business, an avocation rather than a vocation. They do not constitute the production of poultry or poultry products, as specified in Section 75(r), nor do

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[6] See note 4, page 5, *supra*.

they appear to constitute her "primary" activity or occupation. And she certainly does not derive the principal part of her income from those activities.

3

Finally, as the Circuit Court below said, we are dealing here with the individual petition of one of the members of the "Comunidad", not a petition by or on behalf of the "Comunidad" itself which could have been filed under Section 75(s), par. 4. If the members of the "Comunidad" be treated as "joint tenants" or "tenants in common" as those terms are known to the Anglo-American law, neither the common properties nor administration thereof could have been drawn into the jurisdiction of the Bankruptcy Court upon the individual petition of a member owning a one-twelfth undivided interest. (*In re Harris*, 15 Fed. Supp. 404.)

But the "Comunidad" was much more than an Anglo-American joint tenancy or tenancy in common. It was an Anglo-American conventional partnership. *Benites* v. *Bank of Nova Scotia*, 110 F. (2d) 169, 172, decided March 8, 1940. In that case the Circuit Court below confirmed an order of the United States District Court for Puerto Rico denying a motion for stay of the master's sale and further proceedings in the same equity cause already referred to hereinabove which motion had been filed by another member of this same "Comunidad" in proceedings under Section 74 of the Act upon his individual petition.

The members of this "Comunidad" are therefore co-partners, and the agricultural operations are those of the "Comunidad", not those of petitioner. It is furthermore quite obvious that the properties and business of the "Comunidad" (a partnership) could not be brought within the exclusive jurisdiction of the Bankruptcy Court upon the

individual petition of one of its members (co-partners). (*Benites* v. *Bank of Nova Scotia*, 110 F. (2d) 169, *In re Gersteneang*, D. C., 52 F. (2d) 863; Section 5(h) of the Bankruptcy Act.

Thus, even if petitioner had qualified as a farmer, the filing of her individual petition under Section 75 would not have brought into play the automatic and self-executing stay provisions of that section with reference to the properties of the "Comunidad" (partnership) nor those of the corporation, and the Bankruptcy Court would not have thereby obtained jurisdiction, exclusively or otherwise, over their properties and affairs. And yet these were the results which petitioner sought to achieve by her proceedings under Section 75.

4

The various other questions discussed in petitioner's brief appear to us to have no relevancy on the matter now before this Court.

Conclusion.

The decision of the Circuit Court below is correct. There is no conflict of decisions and no question of importance calling for a review by this Court.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HENRI BROWN,
Counsel for Respondent

WALTER L. NEWSOM, JR.,
Of Counsel.

June 17, 1940.

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Appendix.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE FIRST CIRCUIT

OCTOBER TERM, 1939.

No. 3487.

CARLOTA BENITEZ SAMPAYO,
Defendant, Appellant,

v.

THE BANK OF NOVA SCOTIA,
Complainant, Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR PUERTO RICO.

Before WILSON, MAGRUDER and MCLELLAN, *JJ.*

Opinion of the Court

UPON PETITION FOR REHEARING.

FEBRUARY 21, 1940.

PER CURIAM. Challenging our holding that the new definition of "farmer" in the Chandler Act applies to proceedings under Section 75 of the Bankruptcy Act, appellant cites a general order in bankruptcy relating to petitions under Section 75 filed by personal representatives of deceased farmers. General Order No. 50 (9), effective February 13, 1939, reads in part as follows: "* * * The

petition shall show to the satisfaction of the district court that the decedent at the time of his death was a farmer within the meaning of subdivision (r) of section 75 * * *" (305 U. S., App. p. 30). Form in Bankruptcy No. 63, accompanying the General Orders in Bankruptcy, provides that a petition under Section 75 shall recite that the petitioner "is primarily *bona fide* personally engaged in producing products of the soil (or that he is primarily *bona fide* personally engaged in dairy farming, the production of poultry or livestock, or the production of poultry products or livestock products in their unmanufactured state, or the principal part of whose income is derived from any one or more of the foregoing operations)".

This provision of General Order No. 50 (9) was carried over without change from old General Order L (9) promulgated April 17, 1933 (288 U. S. 643). Form 63 was carried over without substantial change from the earlier Form No. 65 (288 U. S. 646).

The inference is that the Supreme Court in its latest revision of the General Orders in Bankruptcy, relating to proceedings under Section 75, has assumed that the old definition of "farmer" in Section 75(r) was not affected by the Chandler Act. Had this matter been called to our attention before, we should have regarded even a tacit interpretation put upon the Chandler Act by the Supreme Court as of great importance, though not as compelling as would be a considered decision of the Supreme Court in a litigated case.

In determining whether we should draw the inference which appellant would have us draw from the general order in bankruptcy above referred to, it is noteworthy that the Supreme Court itself has had occasion to disregard a general order in bankruptcy inadvertently carried over and republished after a significant but unnoticed change of the law. *Meek* v. *Centre County Banking Co.*, 268 U. S. 426. In all candor we cannot now say that we believe our previously announced conclusion to be erroneous. That conclusion seemed to us plainly indicated on the face of the statute.

We are far from implying that appellant would qualify as a "farmer" even if the old definition in Section 75(r) is still in effect. If *Shyvers* v. *The Security-First National Bank*, decided by the Circuit Court of Appeals for the Ninth Circuit on December 21, 1939, is correct, appellant would seem not to be a "farmer" even under the definition of Section 75(r). We have not gone into this, because we believe that the applicable definition is the new one found in the Chandler Act.

The petition for rehearing is denied.